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No. 85-1804

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS WEST,
Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906 AND ANTHONY VINCENT IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether the complaint in a hybrid action against an employer for breach of the collective bargaining agreement and against a union for breach of its duty of fair representation must be both filed and served within six months when the applicable statute of limitations unambiguously requires service of the complaint within six months and when the statute's service requirement furthers the public interest of promoting the prompt and final resolution of labor disputes.

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Respondents Brotherhood of Maintenance of Way Employes, Local 2906 ("BMWE") and Anthony Vincent, a BMWE representative, respectfully submit this brief in opposition to the petition of Thomas West for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

This case arises out of a so called "hybrid" action alleging violation of a collective bargaining agreement by petitioner's employer and breach of the duty of fair representation by his

union. There is no real disagreement among the parties concerning the essential facts.

From February 9, 1981 to November 27, 1981, petitioner Thomas West was employed by Consolidated Rail Corporation ("Conrail") as a Bridge and Buildings Mechanic. West, who is a member of BMWE, was represented by Local 2906.

On November 12, 1981, four bottles of beer were discovered in a company truck in which petitioner was riding, and he was dismissed from service for possession of alcoholic beverages in violation of company rules on November 27, 1981. Shortly thereafter, Anthony Vincent, petitioner's union representative, filed a grievance on petitioner's behalf seeking reinstatement and back pay. On February 9, 1984, over two years later, Conrail agreed to reinstate petitioner without back pay, and he returned to work on February 16, 1984. For the purposes of this appeal, the parties agree that petitioner's cause of action accrued on March 25, 1984, when he learned, for the first time, that BMWE was allegedly making no effort to process his claim for back pay and that there was little chance that any further appeal would be taken.

On September 24, 1984, within six months after his cause of action accrued, petitioner filed a complaint in the United States District Court for the District of New Jersey against Conrail and its successor in interest, respondent New Jersey Transit, for violation of the collective bargaining agreement and against BMWE for breach of its duty of fair representation. However, petitioner did not mail copies of the summons and complaint to respondents until October 11, 1984. Respondents acknowledged receipt of the summons and complaint on various dates from October 12 to October 22, 1984. Thus, although petitioner filed this action within six months after his cause of action accrued, he did not complete service on respondents until after the six-month statute of limitations had run.

Respondents moved for summary judgment on the ground that the six-month statute of limitations, borrowed by this Court from Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), required that the complaint be filed *and* served within six months. *See DelCostello v. Intl. Brotherhood of*

Teamsters, 462 U.S. 151 (1983). The district court agreed and ruled that petitioner's action was time-barred because the complaint was not filed and served within six months after his cause of action accrued.

A divided panel of the United States Court of Appeals for the Third Circuit affirmed the district court's decision. The court of appeals held that the complaint in a hybrid breach of contract/duty of fair representation action such as this must be filed and served within six months. The language of the statute unambiguously requires that the complaint be filed and served within six months. Moreover, the six-month statute of limitations represents the proper balance between the need for prompt resolution of labor disputes on the one hand and the interest in assuring adequate representation of employees on the other. Thus, the court of appeals properly concluded that the policy of promoting the prompt resolution of such disputes is best served by requiring both filing and service of the complaint within six months.

Judge Gibbons dissented on the ground that the requirement of service within the limitations period is, in his view, unique to administrative proceedings brought under the NLRA and has no application to hybrid breach of contract/duty of fair representation actions brought in federal district court.

ARGUMENT

I. The Decision Below Does Not Raise An Important Question Of Law Requiring Immediate Resolution By This Court.

Under well-established rules of this Court, review of a writ of certiorari is a matter of judicial discretion and will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 17. Contrary to petitioner's contention, the decision below does not involve an important question of law requiring immediate resolution by this Court.

Petitioner concedes, as he must, that the decision of the court of appeals in this case is consistent with the decisions of

two other courts of appeals that have considered and decided this issue. *See Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); *Williams v. Greyhound Lines, Inc.*, 756 F.2d 818 (11th Cir. 1985). Moreover, it is undisputed that this Court has previously refused to grant a petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to consider this very issue. *Simon v. Kroger Co.*, 105 S. Ct. 2155 (1985) (three justices dissenting), *denying cert. to Simon v. Kroger Co.*, 743 F.2d 1544 (11th Cir. 1984). In addition, several district courts have held that service of the complaint must be made within six months. *See Ellenbogen v. Rider Maintenance Corp.*, 621 F.Supp. 324 (S.D.N.Y. 1985), *app. pending*, 2d Cir. No. 85-7926 (argued April 14, 1986); *Waldon v. Motor Coils Manufacturing Co.*, 606 F.Supp. 658 (W.D. Pa. 1985); *Thompson v. Ralston Purina Co.*, 599 F.Supp. 756 (W.D. Mich. 1984); *Hoffman v. United Markets, Inc.*, 117 LRRM 3229 (N.D. Cal. 1984).

To date, only one court of appeals has ruled that service of the complaint in a hybrid breach of contract/duty of fair representation action need not be completed within six months after the cause of action accrues. *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *pet. for cert. pending*, 54 U.S.L.W. 3584 (February 21, 1986, No. 85-1400). Moreover, to the best of our knowledge, only one district court outside the Sixth Circuit has reached the same result. *Thomsen v. UPS*, 608 F.Supp. 1244 (S.D. Ia. 1985), *app. pending*, 8th Cir. No. 85-1830 (argued February 13, 1986).

In sum, the great majority of courts that have considered this issue have ruled that both filing and service of the complaint must be accomplished within the six-month time period. While the issue is currently under consideration in two other circuits, only the Sixth Circuit has held that the complaint need not be filed and served within six months, and a petition for a writ of certiorari to review that decision is now pending before this Court. *Macon v. ITT Continental Baking Co., supra.* Although we believe that the Court should issue a writ of certiorari to review the judgment of the Sixth Circuit in that case, petitioner has failed to satisfy the criteria for the issuance of a writ of certiorari in this case. At most, action on

petitioner's request for issuance of a writ in this case should be stayed pending a decision by the Court in *Macon.*

II. The Court Of Appeals Correctly Held That The Complaint In A Hybrid Action Alleging A Breach Of The Collective Bargaining Agreement And Breach Of The Duty Of Fair Representation Must Be Both Filed And Served Within Six Months.

In *DelCostello*, this Court, faced with the lack of a uniform statute of limitations governing hybrid actions such as this, "borrowed" the six-month statute of limitations found in Section 10(b) of the National Labor Relations Act ("NLRA"). 29 U.S.C. § 160(b). The statute, which governs the procedural mechanism for instituting and prosecuting an unfair labor practice complaint before the National Labor Relations Board ("NLRB"), requires that an unfair labor practice charge be both filed and served within six months.

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months *prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.*

Id. (emphasis added).

The Court applied the six-month statute of limitations found in Section 10(b) of the NLRA to hybrid actions because of the similarity of such actions to unfair labor practice charges and because of "considerations relevant to the choice of a limitations period." 462 U.S. at 170-171.

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. . . . *Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, as well as the clear congressional*

> *indication of the proper balance between the interests at stake, counsels the adoption of* § 10(b) *of the* NLRA *as the appropriate limitations period for lawsuits such as this.*

Id. at 171 (emphasis added), *quoting United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring). Thus, the Court found that adoption of the six-month limitation period best served the need for uniformity, speed, and finality in the resolution of labor disputes.

Although the Court did not expressly address the statute's six-month service requirement in *DelCostello,* the considerations that prompted adoption of the statute of limitations require both filing *and* service of the complaint within six months after the cause of action accrues. The filing and service of the complaint performs essentially the same function as the filing and service of an unfair labor practice charge in proceedings before the NLRB. The six-month time limitation promotes the prompt resolution of labor disputes, and the prompt resolution of such disputes is best accomplished by adopting both the filing requirement and the service requirement of Section 10(b). Failure to adopt the statute's unambiguous service requirement would delay the initiation of the dispute resolution process and defeat the objective of facilitating the speedy and final resolution of labor disputes. Indeed, because the Federal Rules of Civil Procedure ordinarily allow an additional 120 days after filing of the complaint to complete service, the time for serving the complaint would be increased from six to ten months. *See* Fed. R. Civ. P. 4(j).

In light of the fact that Congress expressly provided a statutory service requirement for closely analogous claims, "the intent, spirit, and plain language of § 10(b) require that a complaint [in a hybrid action such as this] be both filed and served within the six-month limitation period." *Simon v. Kroger Co.,* 743 F.2d at 1546.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Date: June 2, 1986

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served pies of the Brief Of Respondents Brotherhood Of Maintenance Of Employes, Local 2906 And Anthony Vincent In Opposition To the tition by first-class mail, postage prepaid and properly dressed to the following:

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